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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 08-1457/1994

[Filed September 17, 2009]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,
Plaintiffs-Appellants / Cross-Appellees,

v.

INDUSTRIAL CONTRACTING, LLC, a Michigan limited liability company, and LASALLE GROUP, INC., a Michigan corporation,
Defendants-Appellees / Cross-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 05-71141—John Corbett O'Meara, District Judge.

Argued: March 11, 2009

Decided and Filed: September 17, 2009

Before: BATCHELDER, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

COUNSEL

ARGUED: Walter B. Fisher Jr., FILDEW HINKS, PLLC, Detroit, Michigan, for Appellants. Steven A. Wright, STEVEN A. WRIGHT, P.C., Shelby Township, Michigan, for Appellees. **ON BRIEF:** Walter B. Fisher Jr., Charles S. Kennedy, III, FILDEW HINKS, PLLC, Detroit, Michigan, for Appellants. Steven A. Wright, Sandra L. Wright, Patrick J. Carleton, STEVEN A. WRIGHT, P.C., Shelby Township, Michigan, Gene J. Esshaki, ABBOTT NICHOLSON, P.C., Detroit, Michigan, for Appellees.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. The plaintiffs in this labor dispute are trustees of an association of various benefit funds established under the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. §§ 141-67, 171-97, and the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001 - 1461, and maintained for the benefit of members of the Michigan Regional Council of Carpenters, AFL-CIO (the union). They filed this action against defendants Industrial Contracting, LLC, and LaSalle Group, Inc., claiming that "[f]or all relevant purposes, [the two companies] are one and the same, constituting a single employer, with each being

the alter ego of the other" and seeking to audit the books of both defendants to verify the accuracy of the contributions that they were contractually obligated to make to the plaintiffs under the provisions of the collective bargaining agreement (CBA) between the union and Industrial Contracting.

The district court granted summary judgment in favor of the defendants, based on its determination that, as a matter of law, the "alter ego" doctrine was inapplicable in this case because the plaintiffs had "failed to present any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." We conclude that this decision cannot be reconciled with our opinion in *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), in which we held that "a finding of employer intent is not essential or prerequisite to imposition of alter ego status. . . . [but] is merely one of the relevant factors which the [courts] can consider." *Id.* at 581. We therefore reverse the district court's judgment and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

As we noted in *Allcoast Transfer*, "th[e] factors relevant to a finding of alter ego status include 'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership.'" *Id.* at 579 (quoting *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)). Our inquiry, then, begins with a review of the evidence, largely undisputed, that was supplied at the summary judgment stage of the litigation. That evidence established that the funds are

beneficiaries of a CBA signed between the Michigan Regional Council of Carpenters and Detroit-area employers in the construction industry. The CBA requires employers to make contributions to the funds on behalf of covered employees, including fringe benefits that are calculated based on either the hours worked by covered employees or a percentage of the employees' base wages. The contract also covers subcontracting ("[n]o employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained in the Agreement") and alter-ego operations. The contract clause covering the latter provides that if "work of the type covered by this Agreement" is performed by any entity, regardless of under what name it is performed,

> wherein the Employer (including its officers, directors, owners, partners, or stockholders) exercises either directly or indirectly (such as through family members) any significant degree of ownership, management, or control, the terms and conditions of this Agreement shall be applicable to all such work and to such successor or alter ego entity.

The controversy arose because of the overlapping establishment and convergence of the defendant companies. LaSalle was incorporated in 1990. Steven Palermo became a minority owner of LaSalle in 1995 and a majority owner approximately five years later. Although LaSalle was a signatory to the CBA with the union at the time Palermo purchased his ownership interest, the company declined to renew the contract

when it expired on June 1, 2003. In the meantime, Steven Palermo and his brother Randy had formed another company in 2001 that was the predecessor to Industrial Contracting, LLC. Three years later, Steven Palermo sold his half-interest in Industrial Contracting to his former brother-in-law, Chester Jablonski, who purchased an additional 1.8 percent interest from Randy Palermo. Industrial Contracting was not a signatory to any CBA until it entered an agreement with the union on June 1, 2003, at the same time that LaSalle terminated its relationship with the union.

In addition to his majority interest in Industrial Contracting, Jablonski was LaSalle's chief financial officer and had previously served as its vice president, secretary, and treasurer. He managed the day-to-day operations for both Industrial Contracting and LaSalle, and he acted as the contact with the union for both companies. Jablonski testified that he had the authority to sign Steven Palermo's signature on LaSalle documents for "pretty much whatever I need his signature on."

According to the LaSalle website as accessed in 2006, the company was a general contractor and construction management company that had a total of 110 field employees, including in-house carpenters and other tradespeople. However, in a deposition taken in September 2003, a LaSalle official said that the company did not hire tradespeople directly at that time and had only ten laborers on its payroll, down from the "40 or 50" workers employed by LaSalle on June 1 of that year, at the termination of its collective bargaining agreement with the union. Industrial Contracting was a subcontractor that provided labor

and supervision for construction projects, also referred to by Jablonski as an "employee leasing company." At the time the lawsuit was filed, Industrial Contracting had never supplied laborers to any company other than LaSalle.

LaSalle and Industrial Contracting shared many of the same supervisory personnel during the relevant period. For example, Matthew Bertrang and Dave Walasek were listed as employees and supervisors at both companies. Dave Walasek, a labor superintendent and union member, worked for LaSalle until "they switched over," when he was notified by Wes Gerecke, the Field Operations Manager for LaSalle, that he would be working for Industrial Contracting. He testified that his job did not change in any way after he went to work for Industrial Contracting and that Wes Gerecke continued to exercise direction over the projects on which he worked. Matthew Bertrang, a carpenter superintendent and union member, worked for LaSalle until the middle of 2003. After LaSalle terminated its collective bargaining agreement, Bertrang testified that he was given the choice of looking for another job or working for Industrial Contracting. Bertrang, too, said that his job did not change when he moved to Industrial Contracting and that his "direct boss" was Wes Gerecke. Gerecke also assigned Bertrang to various projects and procured equipment for him. Gerecke testified that he supervised Industrial Contracting employees and monitored their needs for material, equipment, and manpower on a day-to-day basis.

At the time the dispute arose, Industrial Contracting and LaSalle were housed in the same building and had rental agreements with the same

real estate company, owned by Steven Palermo. LaSalle paid $9500 a month for the building, and Industrial Contracting rented an office in the building for $200 a month. Before 2005, Industrial Contracting employees received reimbursement checks from LaSalle's account and were covered by LaSalle's workers' compensation insurance policy. In addition, LaSalle paid for Industrial Contracting's general liability insurance policy and Industrial Contracting employees continued to use LaSalle's telephone system and LaSalle business cards. Until 2005, Industrial Contracting billed LaSalle only for its wages and direct costs; in 2005 Industrial Contracting began charging a three-percent markup. During the same period, Industrial Contracting did not own its own equipment, but instead used equipment owned by LaSalle, the use of which LaSalle did not track.

Several LaSalle documents in the record refer to Industrial Contracting employees as LaSalle employees. For example, on the "GM Catering Kitchen" job, the daily report lists the superintendent and foreman as LaSalle employees when they were actually employed by Industrial Contracting. Likewise, on a bid for the "GM Hines Theater" project, an Industrial Contracting employee is listed as a LaSalle employee. For the "DCX Walbridge Aldinger" project, LaSalle was placed on an approved list for bids for which only union signatories were eligible, and a Walbridge Aldinger project manager testified that he mistakenly thought that LaSalle was a union signatory. Moreover, LaSalle failed to list Industrial Contracting as a subcontractor on DCX project documents requiring a list of all subcontractors. LaSalle also submitted invoices for work done by Industrial Contracting employees on the DCX project

as "self-perform" work, enabling the company to charge five percent more for work purportedly performed "in house" by LaSalle.

Despite the virtual mountain of evidence establishing the intermingling of the two companies, the district court granted the defendants' motion for summary judgment, holding that, even though the plaintiffs "ha[d] shown most of the similarities between LaSalle and Industrial that were required under *Fullerton*,"[1] the defendants were entitled to prevail as a matter of law simply because the record was devoid of "any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." The plaintiffs now appeal that ruling and also complain that the district court improperly struck a portion of the brief they filed in response to the defendants' motion for summary judgment, in which they raised an alternative theory of recovery that had not been raised prior to the close of discovery. The defendants have filed a cross-appeal, contending that as prevailing parties below, they should have been awarded costs and attorneys' fees.

The latter two rulings represent an exercise of the district court's discretion, and nothing in the record suggests to us that the court abused its discretion in reaching the decisions that it did. Moreover, in view of the result we reach today, both of these issues have become moot and, therefore, need not be resolved.

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[1] *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331 (6th Cir. 1990).

DISCUSSION

A district court's grant of summary judgment is reviewed de novo, *see International Union v. Cummins, Inc.*, 434 F.3d 478, 483 (6th Cir. 2006), and is appropriate when there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of Law." FED. R. CIV. P. 56(c). In considering a motion for summary judgment, we must view the inferences to be drawn from the underlying facts in favor of the non-moving party, in this case the plaintiffs. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Questions of fact, including a district court's factual determination that two companies are (or are not) alter egos, are reviewed for clear error. *See Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 587 (6th Cir. 2006).

The alter ego doctrine is an equitable doctrine "developed to prevent employers from evading obligations under the [National Labor Relations] Act merely by changing or altering their corporate form." *Allcoast Transfer*, 780 F.2d at 579. The doctrine operates to bind an employer to a collective bargaining agreement if it is found to be an alter ego of a signatory employer. *See id.* at 582-83. We have addressed alter-ego operations that occur in two factual contexts. The first is when the new entity begins operations but is "'merely a disguised continuance of the old employer.'" *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331,336 (6th Cir. 1990) (quoting *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). The second is what is referred to as a "double-breasted operation," where "two or more coexisting employers performing the

same work are in fact one business, separated only in form." *Fullerton Transfer*, 910 F.2d at 336.

The Sixth Circuit test for determining whether two companies are alter egos has been adopted from the case law of the National Labor Relations Board. We look to see "'whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership.'" *Id.* (quoting *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)). In applying these factors, no individual factor is outcome determinative; instead, "all the relevant factors must be considered together." *Allcoast Transfer*, 780 F.2d at 582. Under Sixth Circuit precedents, moreover, an employer's intent to evade the obligations of a collective bargaining contract is merely one of the factors to be considered and is not a prerequisite to the imposition of alter-ego status. *Fullerton Transfer*, 910 F.2d at 337. We came to this conclusion based on our reasoning that "an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations." *Allcoast Transfer*, 780 F.2d at 582; *see also Wilson v. Int'l Bhd. of Teamsters*, 83 F.3d 747, 759 (6th Cir. 1996) ("[C]ommon ownership or an intent to evade federal labor law obligations are not necessary prerequisites to a finding of alter ego status.").

In double-breasting cases, we have confronted two common fact patterns: (1) the "classic" double-breasting operation in which a union contractor creates a second, non-union company, and (2) the

"reverse" double-breasting situation in which a non-union company opens a sister company that becomes a union signatory. A paradigm example of classic double-breasting can be found in *Allcoast Transfer*, in which the respondent, a unionized moving and storage company, formed an ostensibly separate non-union corporation in order to serve as a licensee for a nationwide moving company. *See* 780 F.2d at 578. We upheld the NLRB's determination that the two companies were alter egos because they had substantially "identical management and supervision," the same business purpose, and the same employees and equipment. *See id.* at 582.

An example of reverse double-breasting was involved in *Trustees of the Resilient Floor Decorators Insurance Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005). In that case, a former employee of a non-union carpet sales company started a carpet installation company that hired union labor. The companies shared office and warehouse space and secretarial staff, and the president of the installation company was the former brother-in-law of the president of the sales company. *See id.* at 246-47. We found that the two companies were not alter egos, however, on alternative bases: (1) because the non-union carpet sales company had no preexisting labor obligations to evade, (2) because there was no "pervasive intermingling of funds and operations" as found in other alter ego cases, and (3) because the installation company's workers were, in fact, independent contractors and not "employees" under ERISA. *See id.* at 248-49, 251.

In this case, the district court relied upon our observation in *Resilient Floor* that the union had

"disregard[ed] the fact that 'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine'" and that, in the absence of proof that the union had been short-changed in some manner by changes in the structure of the two entities involved in the dispute, there could be "no inequity that would justify a court's imposition of liability." *Id.* at 248 (quoting *Cement Masons' Pension Trust Fund v. O'Reilly*, 664 F.Supp. 277, 279 (E.D. Mich. 1987)). The district court also relied on an unpublished district court opinion from the Eastern District of Michigan, *Cement Masons' Trust-Fund v. McCarthy*, 2006 WL 770444 (E.D. Mich. 2006), quoting that opinion as holding that the Sixth Circuit has "categorically rejected application of the alter ego doctrine in the . . . situation [in which] . . . a nonunion company establishes a union company and no preexisting labor obligations are disrupted." *Id.* at *4 (quoting *Resilient Floor*).

We conclude that the district court's analysis does not stand up to *de novo* review. The *Resilient Floor* opinion is of limited authority, given its alternative holdings and its ultimate conclusion that the workers in question were independent contractors and not, in fact, covered employees. Moreover, the excerpt from *Resilient Floor* quoted by the district court – that "'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine'" – is taken from the statement in *Allcoast* that "[t]he alter ego doctrine was developed to prevent employers from evading obligations under the [LMRA] merely by changing or altering their corporate form." *Allcoast*, 780 F.2d at 579. But, confusing the *purpose* of the alter ego doctrine with the Sixth Circuit's *test for determining whether it should be applied* apparently led the district

court in this case to conclude – incorrectly – that evidence of an intent to evade was a prerequisite to the doctrine's imposition.

It bears repeating at this point that evidence of an intent to evade, when it presents itself, is a relevant factor to be considered in determining whether the alter ego doctrine is applicable, along with "the well-established factors of substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership" – but it is *not* essential to the imposition of alter ego status. *Id.* at 581; *see also Fullerton Transfer*, 910 F.2d at 337 ("[T]his Circuit has not required . . . a showing of employer intent in order to apply the liberalized alter ego standard. . . . [because] intent can too easily be disguised."). To the extent that *Resilient Floor* can be seen to conflict with the holding in *Allcoast Transfer* and *Fullerton Transfer*, we suggest that it should be confined to its facts.

That brings us to the application of the recognized factors to the situation in this case. As noted above, the record is replete with evidence of entanglement between LaSalle and Industrial Contracting. The defendants do not contest those facts on appeal, nor could they, given the documentary nature of the plaintiffs' proof. Instead, they maintain that they have never acted purposefully to evade union obligations and that it is the plaintiffs who were guilty of "culpability or bad faith" in suing the defendants "concerning on-going audits with which [the defendants] were already cooperating." Under these circumstances, we conclude that summary judgment should have been entered in favor of the plaintiffs, and

we therefore remand the case to the district court with instructions to enter such an order.

CONCLUSION

For the reasons set out above, the judgment of the district court is REVERSED, and the case is REMANDED for entry of judgment in favor of the plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-1457; 08-1994

[Filed September 17, 2009]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, Plaintiffs-Appellants/Cross-Appellees,	)
v.	)
INDUSTRIAL CONTRACTING, LLC, a Michigan limited liability company, and LASALLE GROUP, INC., a Michigan corporation, Defendants-Appellees/Cross-Appellants.	)

Before: BATCHELDER, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for entry of judgment in

favor of plaintiffs Trustees of the Detroit Carpenters Fringe Benefit Funds.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-71141
Honorable John Corbett O'Meara

[Filed July 14, 2008]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, Plaintiffs,	)
v.	)
INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC., Defendants.	)

OPINION AND ORDER DENYING DEFENDANTS' MARCH 12, 2008 MOTIONS FOR FEES AND COSTS AND DENYING DEFENDANT LASALLE'S MAY 12, 2008 MOTION TO STRIKE

This matter came before the court on defendants The LaSalle Group's ("LaSalle's") and Industrial Contracting's March 12, 2008 motions for attorney fees and costs and defendant LaSalle's May 29, 2008

motion to strike Plaintiffs' notice of supplemental authority. Plaintiffs filed a response to Defendants' fees motions March 26, 2008; and defendant LaSalle filed a reply April 2, 2008. Plaintiffs filed a response to LaSalle's motion to strike June 11, 2008. Pursuant to Local Rule 7.1 (e)(2), no oral argument was heard.

On July 25, 2007, this court granted summary judgment to Defendants on Plaintiffs' complaint, which sought to audit Defendants and to find Defendants liable pursuant to a collective bargaining agreement under an alter ego theory. The complaint sought, among other things, "all sums shown by the audit to be due to Plaintiffs." Complaint at p. 3, ¶C. After the court's ruling on Defendants' motions for summary judgment, Plaintiffs filed a motion for reconsideration, which the court denied March 4, 2008. Defendant LaSalle now seeks $107,576.11 in attorney's fees and costs for the services rendered by Steven A. Wright, P.C.; defendants Industrial Contracting and LaSalle seek an additional $68,671.68 in attorney's fees and costs for the services rendered by Abbott Nicholson, P.C.

LAW AND ANALYSIS

The court has discretion to permit an award of attorney's fees in this case pursuant to 29 U.S.C. § 1132(g)(1). When exercising its discretion, the trial court should consider the following factors:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the

> party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Tiemeyer v. Community Mut. Ins. Co., 8 F.3d 1094, 1101 (6th Cir. 1993) (citing Secretary of Dep't of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985)).

In this case there is a certain degree of culpability, but perhaps not bad faith, on the part of Plaintiffs. The complaint alleged that Plaintiffs were compelled to file suit because "[d]espite demands by Plaintiffs, Defendant has failed, neglected and refused to permit the audit." Complaint at ¶9. However, Robert Reeves, Plaintiffs' auditor, testified that up to and through the time of filing the complaint, there was nothing in his file to show that Defendants had either failed to provide any information requested or failed to fully cooperate with the audit. Reeves dep. at p. 19-25. When Plaintiffs decided to pursue the alter ego claim against Defendants, Plaintiffs suspended the audit and filed this action. In retrospect, Plaintiffs may have been hasty in the filing of this suit; however, after they decided to pursue an alter ego claim, it is doubtful the parties would have resolved their issues without litigation.

As for the second factor, Plaintiffs have the ability to satisfy and award of attorney's fees. Third, it is difficult to speculate whether an award of fees in this case may have a deterrent effect on other suits against similar employers who withdraw from multiple-employer collective bargaining agreements. Fourth, although Defendant sought to confer a common benefit

on all participants and beneficiaries of that particular plan, the suit failed to resolve significant legal questions regarding ERISA. Finally, despite the fact that Defendant ultimately prevailed in this lawsuit, the court finds that the suit was not entirely without merit. For all of these reasons, the court will deny Defendants' motions for fees and costs pursuant to both 29 U.S.C. § 1132(g)(1) and Rule 54(d)(1) of the Federal Rules of Civil Procedure.

ORDER

It is hereby **ORDERED** that defendants LaSalle's and Industrial Contracting's March 12, 2008 motions for fees and costs are **DENIED.**

It is further **ORDERED** that defendant LaSalle's May 29, 2008 motion to strike Plaintiffs' notice of supplemental authority is **DENIED.**

s/John Corbett O'Meara
United States District Judge

Date: July 14, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 14, 2008, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-71141
Honorable John Corbett O'Meara

[Filed March 4, 2008]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,	)
Plaintiffs,	)
v.	)
INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC.,	)
Defendants.	)

ORDER
DENYING PLAINTIFFS' MOTION
FOR RECONSIDERATION AND
GRANTING DEFENDANTS' MOTION TO
STRIKE PLAINTIFFS' REPLY

This matter came before the court on Plaintiffs' August 8, 2007 motion for reconsideration. Defendants

filed a response November 7, 2007; and Plaintiffs filed a reply brief November 20, 2007. Defendants then filed a motion to strike Plaintiffs' reply brief on November 27, 2007; and Plaintiffs filed a response to that motion November 30, 2007. Pursuant to Local Rule 71.(g)(2)(E.D. Mich. Dec. 1, 2005), no oral argument was heard.

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

Local Rule 7.1(g)(3).

In this case Plaintiffs have failed to demonstrate a palpable defect by which the court and the parties have been misled. Plaintiffs' motion for reconsideration merely presents the same issues and reiterates the same arguments the court has already considered and rejected. Therefore, the court must deny Plaintiffs' motion for reconsideration.

Moreover, Plaintiffs filed a reply brief to their motion for reconsideration without leave of the court. Because neither the Federal Rules of Civil Procedure nor the Local Rules for the Eastern District of Michigan contemplate the filing of such a brief, Plaintiffs' reply will be stricken from the record. The court notes, however, that even if it accepted Plaintiffs'

reply brief, it would not result in a different disposition of the case.

ORDER

It is hereby **ORDERED** that Plaintiffs' August 8, 2007 motion for reconsideration is **DENIED.**

It is further **ORDERED** that Defendants' November 27, 2007 motion to strike Plaintiffs' reply brief is **GRANTED.**

s/John Corbett O'Meara
United States District Judge

Date: March 3, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, March 3, 2008, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-71141
Honorable John Corbett O'Meara

[Filed July 25, 2007]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,

Plaintiffs,

v.

INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT LASALLE'S NOVEMBER 16, 2006 MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT LASALLE'S JANUARY 8, 2007 MOTION TO EXCLUDE EVIDENCE, PRECLUDE WITNESS TESTIMONY AND STRIKE PORTIONS OF PLAINTIFFS' RESPONSE BRIEF; DENYING AS MOOT PLAINTIFFS' JANUARY 12, 2007

MOTION FOR PARTIAL SUMMARY JUDGMENT; AND DENYING AS MOOT DEFENDANT LASALLE'S MARCH 1, 2007 MOTION FOR SCHEDUING ORDER

This matter came before the court on defendant The LaSalle Group's ("LaSalle's") November 16, 2006 motion for summary judgment; defendant LaSalle's January 8, 2007 motion to exclude evidence, preclude witness testimony, and strike portions of Plaintiffs' response brief; Plaintiffs' January 12, 2007 motion for partial summary judgment; and defendant LaSalle's March 1, 2007 motion for scheduling order. All of these motions were fully briefed except Plaintiffs' motion for partial summary judgment, which the court interprets as a cross-motion to LaSalle's motion for summary judgment. Oral argument on LaSalle's motion for summary judgment was heard February 1, 2007; and although no other motions were set for hearing that day, the court heard argument on the motions that were pending as of that date.

BACKGROUND FACTS

Defendant Industrial Contracting ("Industrial") was incorporated August 21, 2001. Defendant The LaSalle Group terminated its collective bargaining agreement ("CBA") with the Michigan Regional Council of Carpenters ("MRCC") effective May 31, 2003; and on June 1, 2003, the following day, Industrial entered into a CBA with the union. That CBA is still in effect.

The gravamen of the complaint is that Defendants "are alter egos and are each contractually obligated to Plaintiffs pursuant to the collective bargaining

agreement with the union." Complaint at 3. The alter ego analysis was created to stop companies from changing their operations to avoid preexisting union obligations, *i.e.*, a union-represented company forms a non-union company and funnels its work to the latter to avoid paying pension benefits to the funds.

Plaintiffs seek an order directing Defendants to submit their books and records for auditing. The plaintiff funds, however, do not claim that LaSalle or Industrial owe any fringe benefits for any of Defendants' employees; rather, the funds seek fringe benefits for LaSalle's subcontractors' employees.

For the first time in this litigation, Plaintiffs alleged in their response brief to LaSalle's motion for summary judgment that "LaSalle is bound to the local MRCC collective bargaining agreement through its international agreement with the United Brotherhood of Carpenters and Joiners of America ("UBCJA")." Plaintiffs' resp. br. at 2. Throughout discovery, Defendants proceeded under the assumption that Plaintiffs were not disputing that LaSalle legally terminated its agreement with the union on May 31, 2003. Following the filing of Plaintiffs' response brief, however, defendant LaSalle filed a motion to exclude evidence and preclude witness testimony and to strike portions of Plaintiffs' response brief that allege that LaSalle is still bound to the union contract by way of LaSalle's May 28, 1997 agreement with the international.

LAW AND ANALYSIS

As a preliminary matter, the court will grant defendant LaSalle's motion to, among other things,

strike portions of Plaintiffs' response brief. Plaintiffs failed to raise the issue of LaSalle's 1997 agreement with the United Brotherhood of Carpenters and Joiners of America ("UBCJA"), the international union, until their response to LaSalle's motion for summary judgment. Throughout discovery, there was no mention of this agreement. Importantly, there is nothing in the complaint that puts Defendants on notice that Plaintiffs were going to rely on that agreement. Instead, the parties conducted discovery, which ended November 10, 2006, under the assumption that LaSalle had legally terminated its CBA with the Michigan Regional Council of Carpenters. Plaintiffs' introduction of LaSalle's agreement with the UBCJA would fundamentally alter the nature of this suit. Therefore, the court will grant LaSalle's motion to exclude evidence, preclude witness testimony and strike portions of Plaintiffs' response brief.

The United States Court of Appeals for the Sixth Circuit has adopted the NLRB test to determine whether two enterprises constitute alter egos: whether the two have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership. NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331, 336 (6th Cir. 1990). More recently, the Sixth Circuit refined this test in Trustees of Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc., 395 F.3d 244 (6th Cir. 2005).

In the more recent case, the court affirmed the district court's finding that two enterprises were not alter egos even though the two worked on many of the same projects, had the same customers, shared office

and warehouse space in the same building, shared office equipment and staff, and answered each other's phones and assisted with payroll. Id. at 246. The appellate court explained that the alter ego doctrine hinges on the "intent to evade" fringe benefit obligations.

> Resilient Floor disregards the fact that 'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine.' In the absence of some 'indication that the relations between [the companies] has changed over the years or has caused the [union] to receive less than that for which it bargained,' there is no inequity that would justify a court's imposition of liability.
>
> Our own court faced this same argument in a case with nearly identical facts to those presented here, in which an affiliate of Resilient Floor was the plaintiff, and we refused to apply the alter ego theory after concluding that there was 'no injustice, fraudulent intent, or need to protect employees from being deprived of anticipated benefits' that could justify an extension of the doctrine. Because Resilient Floor has not alleged in the present litigation that A & M concealed its close relationship with Carpet Workroom, and because there is no indication that Resilient Floor has not received the full benefit of its collective bargaining agreement with A & M, the application of the alter ego doctrine is inappropriate here as well.

Resilient Floors, 395 F.3d at 248 (citations omitted).

In Cement Masons' Pension Trust-Fund v. McCarthy, No. 04-74006, 2006 WL 770444, at *4, E.D. Mich. 2006), this court recently found that the Sixth Circuit has "categorically rejected application of the alter ego doctrine in the . . . situation . . . where a nonunion company establishes a union company and no preexisting labor obligations are disrupted."

In this case Plaintiffs have shown most of the similarities between LaSalle and Industrial that were required under Fullerton. However, under Resilient Floors, they are now required to do more, that is, to show LaSalle's intent to evade preexisting obligations to the union by creating a new company. This Plaintiffs have failed to do. Industrial was established almost two years before LaSalle ended all of its obligations to the union under the CBA; and LaSalle continued to meet its obligations until it terminated the CBA effective June 1, 2003. Plaintiffs have failed to present any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations. Therefore, the court finds as a matter of law that the alter ego doctrine is inapplicable in this case; and LaSalle is no longer bound by the conditions of the CBA.

ORDER

It is hereby **ORDERED** that defendant LaSalle's January 8, 2007 motion to exclude evidence, preclude witness testimony, and strike portions of Plaintiffs' response brief is **GRANTED.**

It is further **ORDERED** that defendant LaSalle's November 16, 2006 motion for summary judgment is **GRANTED.**

It is further **ORDERED** that Plaintiffs' January 12, 2007 motion for partial summary judgment is **DENIED AS MOOT.**

It is further **ORDERED** that LaSalle's March 1, 2007 motion for scheduling order is **DENIED AS MOOT.**

s/John Corbett O'Meara
United States District Judge

Dated: July 25, 2007

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 25, 2007, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-71141
Hon. John Corbett O'Meara

[Filed July 25, 2007]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,	)
Plaintiffs,	)
v.	)
INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC.,	)
Defendants.	)

JUDGMENT

For the reasons set forth in the court's July 25, 2007, Memorandum Opinion and Order, IT IS HEREBY ORDERED that judgment is entered in favor of Defendants.

Dated: July 25, 2007

DAVID WEAVER
Clerk, U.S. District Court

By: William Barkholz

Deputy Clerk

Approved:

John Corbett O'Meara
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-1457/1994

[Filed November 12, 2009]

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, Plaintiff-Appellant/Cross-Appellee,	)
v.	)
INDUSTRIAL CONTRACTING, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, ET AL., Defendants-Appellees/Cross-Appellants.	)

ORDER

BEFORE: BATCHELDER, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX F

STATUTES

29 U.S.C. § 158. Unfair labor practices

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or

provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

29 U.S.C. § 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting

commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such

employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity

or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5)

of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with

respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction

thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to

January 1, 1947, such funds contained provisions for pooled vacation benefits.